FILED
FEB 18 2003
OFFICE OF THE CLERK

No. 02-241

IN THE

Supreme Court of the United States

BARBARA GRUTTER, *et al.*
Petitioners,

v.

LEE BOLLINGER, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF *AMICI CURIAE* OF VETERANS OF THE SOUTHERN CIVIL RIGHTS MOVEMENT AND FAMILY MEMBERS OF MURDERED CIVIL RIGHTS ACTIVISTS IN SUPPORT OF RESPONDENTS

MITCHELL ZIMMERMAN *
MATTHEW HALL
ANTONIA SEQUEIRA
FENWICK & WEST LLP
801 California Street
Mountain View, CA 94041
(650) 988-8500

* Counsel of Record

Counsel for Amici Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICI CURIAE*	1
ARGUMENT	4
I. THE PROGRESS IN INCREASING THE PARTICIPATION BY PEOPLE OF COLOR IN HIGHER EDUCATION OVER THE LAST FORTY YEARS RESTED AND CONTINUES TO REST IN LARGE PART ON AFFIRMATIVE ACTION	4
II. THE CIVIL RIGHTS MOVEMENT AND AFFIRMATIVE ACTION HAVE, TO A SIGNIFICANT EXTENT, AMELIORATED THE INJUSTICE OF AFRICAN AMERICAN EXCLUSION FROM HIGHER EDUCATION AND THE LEGAL PROFESSION	8
III. THIS COURT ITSELF BENEFITS FROM THE VARIED PERSPECTIVES AND EXPERIENCES BROUGHT BY JUSTICES OF DIFFERENT RACES AND BACK-GROUNDS, AND SHOULD NOT DENY LAW SCHOOLS AND THE LEGAL PROFESSION A SIMILAR BENEFIT	14
CONCLUSION	18

TABLE OF AUTHORITIES

CASES

	Page
Virginia v. Black, No. 01-1107	15
Regents of The University of California v. Bakke, 438 U.S. 265 (1978)	3, 7, 18
Hovey v. Superior Court, 28 Cal.3d 1, 23, 616 P.2d 1301 (1980)	17

OTHER AUTHORITIES

Richard Abel, American Lawyers 281 (1989)	5
Andrew Brimmer, "Economic Cost of Discrimination Against Black Americans," in Economic Perspectives on Affirmative Action, Margaret Simms, ed. (Joint Center for Political and Economic Studies, Washington, DC. 1995)	11
Claude S. Fischer et al., Inequality by Design: Cracking the Bell Curve Myth (Princeton University Press, 1996)	10
Dr. Martin Luther King, Jr. Why We Can't Wait, 1963	7
John Yinger, Closed Doors, Opportunities Lost: The Continuing Costs of Housing Discrimination (Russell Sage Foundation, New York, 1995)	11
Linda Darling-Hammond, "Unequal Opportunity: Race and Education," Brookings Review, Spring 1998	10
Rachel F. Moran, SYMPOSIUM ON LAW IN THE TWENTIETH CENTURY: Diversity and its Discontents: The End of Affirmative Action at Boalt Hall, 88 Cal. L. Rev. 2241, 2247 (2000)	10
Sandra Day O'Connor, "A Tribute to Justice Thurgood Marshall," 4 Stanford L. Rev. 1217 (1992)	15

TABLE OF AUTHORITIES—Continued

	Page
Jerome Shuman, "A Black Lawyers Study," 16 Howard L.J. 225, 272 (1971)	5
Stephanie Straub, The Wisdom and Constitutionality of Race-Based Decision-making in Higher Education Admission Programs: A Critical Look at Hopwood v. Texas, 48 Case W. Res. 133 n.3 (1997)	10
American Bar Association, Commission on Opportunities for Minorities in the Profession, "Miles to Go: Progress of Minorities in the Legal Profession," found at: http://www.abanet.org/ftp/pub/minorities/milestogo.pdf	9
Marianne Bertrand and Sendhil Mullainathan, "Are Emily and Brendan More Employable than Lakisha and Jamal? A Field Experiment in Labor Market Discrimination," found at: http://www.econ.yale.edu/seminars/apmicro/am02/bertrand-021204.pdf	11
Tammy Johnson et al., "Proven Solutions: High-Quality and Diverse Teachers in Small Schools," in Racial Profiling and Punishment in U.S. Schools (Applied Research Center, Oakland, CA 2001), found at: www.arc.org/erase/downloads/profiling.pdf	10
Report of the New York State Bar Association Special Committee on the Law Governing Firm Structure and Operation, "PRESERVING THE CORE VALUES OF THE AMERICAN LEGAL PROFESSION, The Place of Multidisciplinary Practice in the Law Governing Lawyers," found at http://www.law.cornell.edu/ethics/mdp1.htm	9

TABLE OF AUTHORITIES—Continued

	Page
US Census Bureau Table, "Educational Attainment of the Population 15 Years and Over, by Age, Sex, Race, and Hispanic Origin: March 2000," found at http://www.census.gov/population/socdemo/education/p20-536/tab01.txt	8
US Census Bureau Table, "School Enrollment and Educational Attainment, for the United States: 1960," found at http://www.census.gov/population/socdemo/education/cp60pcs1-20/tab-73-75.pdf	8
"Service Academies Defend Use of Race in Their Admissions Policies," New York Times, Jan. 28, 2003	13
"What's in a Name? Perhaps Plenty if You're a Job Seeker," New York Times, Dec. 12, 2002	11

IN THE

Supreme Court of the United States

No. 02-241

BARBARA GRUTTER, *et al.*
Petitioners,

v.

LEE BOLLINGER, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF *AMICI CURIAE* OF VETERANS OF THE SOUTHERN CIVIL RIGHTS MOVEMENT AND FAMILY MEMBERS OF MURDERED CIVIL RIGHTS ACTIVISTS IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICI CURIAE* [1]

Amici are 200 veterans of the Southern Civil Rights Movement, the epic struggle of the 1950s and 1960s to free the United States of segregation and racial discrimination. *Amici* include family members of leaders and activists who

[1] This brief is filed with the written consent of both parties. No counsel for a party wrote this brief in whole or in part, nor did any person or entity, other than *Amici* and their counsel, make a monetary contribution to the preparation or submission of this brief.

were murdered in the course of the struggle to admit the African-American people to full and unfettered participation in American society.

We are not an organization, but are individuals among the many, many thousands who were part of the movement to create a free and just society in the South and throughout America. We include the survivors of Martin Luther King, Jr., Vernon Dahmer, Herbert Lee, Louis Allen, Mickey Schwerner, James Chaney, and Andrew Goodman; include Freedom Riders who were bloodied and nearly killed when a segregationist mob attacked and burned an interstate bus in Anniston, Alabama; include civil rights workers who were battered, beaten and jailed when they tried to organize or demonstrate for voting rights; include one of the four young men who launched the sit-in movement at a lunch counter in Greensboro, N.C. in 1960; native white Southerners who were ostracized for supporting civil rights; leaders who organized the 1964 Mississippi Summer Project; Northern students who were threatened with death when they joined the struggle for a summer; and African American activists and leaders who battled for democratic rights for decades.[2]

We have joined here to try to make our voices heard, so we need never again witness the lives of gifted children and young adults of color blighted by the denial of opportunity. We hope never again to bear the pain of having to explain to them that even though they could benefit from higher education, the circumstances of their lives will effectively exclude them.

We respectfully submit this Friend-of-the-Court Brief in order to warn the Court of the grave threat that the attack on affirmative action poses to the enormous (if imperfect)

[2] A list of the individuals represented in this Brief is attached as the Appendix.

progress made as a result of the great freedom struggle of the 1950s and 1960s.

In this case, the Court faces a stark choice. Will the Court stand by its holding in *Regents of The University of California v. Bakke*, 438 U.S. 265 (1978), recognizing the compelling state interest in educational and professional diversity, and confirm the acceptability of measured affirmative steps taken to ensure that the legal profession does not resume its former status as a virtually all-white preserve? Or must America—in the name of equal protection—move backward, toward *de facto* exclusion, and again blind itself to the value that members of other groups bring to education, social problem-solving, cooperation, conflict resolution, and to the legal profession's search for justice?

Amici Curiae are among those who sacrificed so that our Nation would progress toward becoming a fair, multiracial society—progress that reversal of the Sixth Circuit's decision below would threaten to erase. Amici urge the Court to allow America's public law schools and institutions of higher learning to make reasonable affirmative efforts to promote the diversity that is needed so America can continue its progress toward becoming a society in which all have a fair opportunity to participate, in which diverse voices will be heard, and in which the different historical experiences, perspectives and insights of every race, ethnic group and gender will enrich our entire society.

ARGUMENT

I. THE PROGRESS IN INCREASING THE PARTICIPATION BY PEOPLE OF COLOR IN HIGHER EDUCATION OVER THE LAST FORTY YEARS RESTED AND CONTINUES TO REST IN LARGE PART ON AFFIRMATIVE ACTION

Forty years ago, as a result of state-enforced segregation, unlawful discrimination, and the legacy of a century of racial subordination, African Americans and other people of color were effectively excluded from higher education, legal education and the legal profession.

In 1960, fewer than 5% of African Americans were college graduates, although African Americans were roughly 10% of the population of the United States. Even this figure exaggerates the educational opportunities open to African Americans since it includes graduates of segregated Negro institutions. As a result of segregation, discrimination, and their continuing legacies, African Americans were also necessarily barred from meaningful access to postgraduate education—in 1964 fewer than one percent of students in predominantly white law schools were Black.[3]

Thus, except for a handful of practitioners who had overcome extraordinary obstacles, African Americans were nearly entirely excluded from the legal profession. In 1960,

[3] *See* Report of Special Committee: APPRAISAL OF THE AMERICAN LEGAL PROFESSION IN THE YEAR 2000, http://www.law.cornell.edu/ethics/mdp1.htm, viewed February 5, 2003, (reporting that 433 of over 50,000 students in predominantly white institutions was African American in 1964).

only 1% of American attorneys were African American, and there had been virtually no Black judges in America up to that point.[4]

By destroying the Jim Crow system of state-enforced segregation, the civil rights movement shattered many of the legal barriers to participation and access. But as the decade of noncompliance following *Brown v. Board of Education* had shown, establishing legal rights is not the same thing as effective enforcement and exercise of those rights.

Resistance to the law and to integration was fierce, and *Amici* know from personal experience the bitter cost of challenging the Southern system of white supremacy. Many Americans gave their lives in the struggle. Law enforcement officials and state-sanctioned mobs beat thousands of individuals and committed other acts of fearful violence. Hundreds of churches and homes were dynamited or torched by racist terrorists. And an extraordinary number of individuals lost their jobs, were evicted from their homes and farms, saw their children reviled in school, and suffered other hardship because they fought for the unimpeded exercise of rights that Federal Courts had said African American people possessed.

When their struggle succeeded in dismantling the state-mandated segregation system, the civil rights movement, individual litigants, the legal profession and the courts faced a host of other barriers to equal access to education for African Americans.

- Formal and informal segregationist practices often steered the races into superior white schools and inferior Negro schools in states without statutory segregation.

[4] See Jerome Shuman, "A Black Lawyers Study," 16 Howard L.J. 225, 272 (1971) (2,180 Black lawyers in US in 1960); Richard Abel, *American Lawyers* 281 (1989) (total lawyers in U.S in 1960: 209,684).

- All too often, the level of integration that had been achieved through eliminating formal segregation was substantially undermined by "white flight." And the racial makeup of the suburbs to which whites fled was commonly sustained by *de jure* housing discrimination by government agencies, as well as by redlining and private discrimination.
- Previous economic discrimination meant that families of color lacked the money for college and frequently lacked any experience of higher education, and hence were less able to assist their children in applying for and getting into college.
- Children of color attended under-funded, decaying urban schools in violent neighborhoods, putting them at a severe disadvantage in college preparation and increasing the comparative advantages that white students enjoyed.
- A range of supposedly neutral admissions policies—such as preferences for children of alumni or financial benefactors—tended to advantage white children.

Notwithstanding these and other barriers, the decades following the zenith of the civil rights movement saw great progress. A substantial African American middle class emerged, based in significant part on improved access to education. This was only possible because America recognized that eliminating the formal barriers to educational access would not be enough. The consequences of centuries of slavery, oppression and racism were very real, and actual progress could not occur automatically, nor through the magic of supposedly ignoring race.

Affirmative steps were required if the sacrifices of the civil rights movement were to have meaning for day to day life, beyond the elimination of separate drinking fountains in Southern court houses. If the fruits of the civil rights struggle

were to include changing the role of the African American people in our society, from hewers and carriers to full participants, then positive plans had to be put in place to reach these goals. Otherwise, African Americans would remain liberated in theory but constrained in fact by the cumulative effects of past and current bias and subordination.

Making such affirmative, race-conscious efforts, after legal segregation was ended—and indeed until all of the effects of segregation and discrimination can be eradicated—was plainly a necessity then, as Dr. Martin Luther King, Jr., explained in his 1963 book, *Why We Can't Wait*:

> It is impossible to create a formula for the future which does not take into account that society has been doing something special against the Negro for hundreds of years. How then can he be absorbed into the mainstream of American society if we do not do something special for him now, in order to balance the equation and equip him to compete on a just and equal basis?

Sadly, in the forty years since Dr. King wrote, America has not succeeded in balancing the equation.

Affirmative efforts are still needed in order to ensure that qualified students of color have access to legal education and so law schools can provide their students and the public with the vital benefits of a diverse student body and profession. Law schools are entitled to take race into account today, in the measured way anticipated in *Bakke,* to achieve these ends. This Court previously held such programs—which have dramatically boosted minority educational achievement—to be constitutional, so long as they do not impose racial quotas.[5]

---

[5] *Regents of The University of California v. Bakke*, 438 U.S. 265, 314-16 (1978) (Powell, J.) (holding that "the interest of diversity is compelling in the context of a university's admissions program," and approving consideration of race as one factor among many).

We are painfully aware that many grave problems remain. People of color still bear a host of burdens, present and historical, *de facto* and *de jure,* that hinder their actual access to higher education and to the professions. Nonetheless, the positive side—what *was* won, in part as a result of the sacrifices and struggles of *Amici* and tens of thousands of others—has been inspiring. The positive results of our victories against segregation and discrimination must not be cast aside. We must not turn back from our commitment to remove bias and racial exclusion from American life.

II. THE CIVIL RIGHTS MOVEMENT AND AFFIRMATIVE ACTION HAVE, TO A SIGNIFICANT EXTENT, AMELIORATED THE INJUSTICE OF AFRICAN AMERICAN EXCLUSION FROM HIGHER EDUCATION AND THE LEGAL PROFESSION

Thanks in large part to affirmative action, the fruits of the civil rights struggle now include increasing numbers of young people of color in higher education and in the professions.

- Whereas in 1960, African Americans were less than 5% of college graduates, by 2000 their numbers had risen to approximately 7.5%—still a low number, but more nearly approaching full representation.
- Whereas in 1960, only 1% of law students were African American, by 1996, their participation in legal education had risen to 7.4%.
- Overall, people of color now make up about 10% of attorneys, and approximately 21% of recent law graduates.[6]

[6] US Census Bureau Table, "School Enrollment and Educational Attainment, for the United States: 1960," found at http://www.census.gov/population/socdemo/education/cp60pcs1-20/tab-73-75.pdf; US Census Bureau Table, "Educational Attainment of the Population 15 Years and Over, by Age, Sex, Race, and Hispanic Origin: March 2000," found at http://www.census.gov/population/socdemo/ education/p20-536/tab01.txt; Report of the New York State Bar Association Special Committee on the Law Governing Firm Structure and Operation, "PRESERVING THE CORE VALUES OF THE AMERICAN LEGAL PROFESSION, The Place of Multidisciplinary Practice in the Law Governing Lawyers," found at http://www.law.cornell.edu/ethics/ mdp1.htm; American Bar Association, Commission on Opportunities for Minorities in the Profession, "Miles to Go: Progress of Minorities in the Legal Profession," found at http://www.abanet.org/ftp/pub/minorities/ milestogo.pdf.

The 21% level of participation by students of color amongst recent law graduates—even with the limited affirmative action programs that remain in place—still does not amount to "proportional" representation because people of color comprise 31% of the U.S. population at this time. And though within the judiciary, African Americans are finally now measurably represented, their numbers still remain very small (0.5% to 0.6% of Federal Judges).[7]

Nonetheless, all this *does* add up to substantial progress in the long struggle for actual equality of opportunity. Many factors have led to this progress, but high among them have been the conscious efforts to increase minority enrollments, which is to say, affirmative action in one form or another. We know that affirmative action is still essential to achieving these goals, because wherever affirmative action has been barred by political or judicial action, the participation of students of color in higher education and in law school has plummeted, and the unfair white monopoly on educational access has been restored.

> ***California:*** African Americans and Hispanics totaled 39.1% of the 2000 state population; after Ballot Proposition 209 ended affirmative action, they were 3% of the Boalt Hall law school class (including 0% Blacks).

[7] "Miles to Go," *supra,* note 6.

Texas: African Americans and Hispanics totaled 41.5% of the 2000 state population; after *Hopwood v. Texas* ended affirmative action, they were 3% of the University of Texas law school class (including 0.7% Blacks).[8]

Minorities continue to be less represented in colleges and graduate schools in part because of the perpetuation of the patterns whereby the public schools that house large proportions of minority students are under-funded, over-crowded and inferior by most measures, and because of the discrimination minority children continue to suffer.[9] The lower minority share in education also results from the continuing patterns of housing bias that have kept African

[8] *See* Rachel F. Moran, SYMPOSIUM ON LAW IN THE TWENTIETH CENTURY: Diversity and its Discontents: The End of Affirmative Action at Boalt Hall, 88 Cal. L. Rev. 2241, 2247 (2000); Stephanie E. Straub, NOTE: The Wisdom and Constitutionality of Race-Based Decision-making in Higher Education Admission Programs: A Critical Look at *Hopwood v. Texas,* 48 Case W. Res. 133 n.3 (1997); U.S. Census figures accessed online Feb. 8, 2003 at:

http://quickfacts.census.gov/qfd/states/06000.html;
http://quickfacts.census.gov/qfd/states/48000.html.

[9] For example, schools with a majority of students of color are 3.7 times more likely to be severely overcrowded than schools with fewer than 5% students of color. Tammy Johnson et al., "Proven Solutions: High-Quality and Diverse Teachers in Small Schools," in Racial Profiling and Punishment in U.S. Schools (Applied Research Center, Oakland, CA 2001), found at www.arc.org/erase/downloads/profiling.pdf, viewed February 6, 2003. Black and Latino children are twice as likely to be taught by the least experienced teachers as are white children. Linda Darling-Hammond, "Unequal Opportunity: Race and Education," *Brookings Review,* Spring 1998. Low-income and nonwhite children with perfect math scores on standard 8th grade tests are less likely to be placed into advanced track classes than white, higher income children who miss 25% of answers. Claude S. Fischer et al., *Inequality by Design: Cracking the Bell Curve Myth* (Princeton University Press, 1996).

American people isolated in ghettos,[10] and the enduring bias in employment and other spheres of life.[11] As has repeatedly been shown, and contrary to impressions created by affirmative action foes, it is *not* an advantage in seeking employment in America to be identifiably African American. (See, most recently, a Yale study showing that resumes submitted under "white-sounding" names were 50% more likely to elicit calls for interviews than the identical resumes submitted under "black-sounding" names.[12])

Discrimination, *de facto* and *de jure,* in education, housing and employment continues to burden African American parents in raising and educating their children, and bias continues to provide a comparative advantage to the white population as a whole in higher education admissions. Put more plainly, the effects of bias take most minority children out of the running for higher education, thinning out the competitive field for white children. Although young white students may not be personally part of the problem, they are personally the beneficiaries of the *de facto* pro-white

[10] According to a Federal Reserve study, African Americans are 56% more likely to be rejected for mortgage loans when all variables are controlled for. John Yinger, *Closed Doors, Opportunities Lost: The Continuing Costs of Housing Discrimination* (Russell Sage Foundation, New York, 1995).

[11] A study by a former Governor of the Federal Reserve Bank estimated a $240 Billion cost to the U.S. economy each year of employment discrimination against African Americans. Andrew Brimmer, "Economic Cost of Discrimination Against Black Americans," in *Economic Perspectives on Affirmative Action,* Margaret Simms, ed. (Joint Center for Political and Economic Studies, Washington, DC. 1995).

[12] Marianne Bertrand and Sendhil Mullainathan, "Are Emily and Brendan More Employable than Lakisha and Jamal? A Field Experiment in Labor Market Discrimination," found at: http://www.econ.yale.edu/seminars/apmicro/am02/bertrand-021204.pdf. reported in the *New York Times,* Dec. 12, 2002 ("What's in a Name? Perhaps Plenty if You're a Job Seeker").

"affirmative action" of racial discrimination, past and present. Curiously, many appear to believe that real affirmative action has no business tampering with this situation. But historical privileges that rest on societal bias do not create a perpetual entitlement which this Court must honor.

In the case of the University of Michigan Law School, as respondents have fully explained, the affirmative action program is entirely consistent with Supreme Court precedent. The University does not use quotas, but considers a wide variety of factors that distinguish one applicant from another. Race is far from the most significant of those factors, though race—like personal achievements, life history and other considerations—is not a trivial factor.

The University has not sought to match racial groups with their proportion in the overall population: Even with its affirmative action program in place, African Americans represent only 6% to 7% of the University's recent law school classes, only about half their numerical representation in the overall U.S. population (12.3% in 2000).[13] Minority students as a whole are 24% of the overall student body, and are therefore substantially "under-represented" as against their share of the overall United States population (31% in 2000). Contrast these numbers, though, with the total number of minority group members in the law school's graduating class of 1960: one.[14]

Plainly, the University's methods have sought to encourage *meaningful* levels of participation, rather than to assure *proportional* representation. This is consistent with the school's stated goals—to establish meaningful diversity.

---

[13] U.S. Census figures accessed online Feb. 10, 2003 at:

http://quickfacts.census.gov/qfd/states/26000.html.

[14] Source: Trial Exhibit 97 and accompanying district court testimony of Prof. John Hope Franklin.

The issue posed by the University's program is whether the state's interests in preserving the educational value of a racially diverse student body and the social value of a racially diverse legal profession are sufficient to survive an equal protection challenge. *Amici* submit that these interests are and must continue to be held to be compelling.

In a society increasingly multi-racial and multi-cultural, it would be intolerable for the legal profession to be virtually all white. Our multifarious American populace cannot be adequately served by attorneys and judges who are nearly all members of one racial group, and our state law schools have a compelling interest in avoiding such an outcome: The education of *all* law students is seriously deficient unless they are exposed to the perspectives and experiences of individuals from diverse backgrounds. And the legal profession as a whole cannot claim to be equipped to represent, communicate effectively with, or adjudicate cases involving the members of a diverse nation, if the profession includes few attorneys or judges who have experienced society from other perspectives. It is imperative that the legal profession include individuals with insights and orientations that have been shaped by their life experiences as members of groups with different histories and experiences.

Interestingly, although the Solicitor General's office has reportedly decided to support Petitioners in their attack on the University of Michigan's affirmative action program, the Army, Navy and Air Force academies remain committed to affirmative action to ensure diversity in their student bodies and officer corps.[15] If maintaining a diverse student body in

---

[15] "Service Academies Defend Use of Race in Their Admissions Policies," *New York Times,* Jan. 28, 2003 ("Even as the Bush administration sides with opponents of affirmative action at the University of Michigan, officials of the nation's service academies say their own minority admissions programs are necessary to maintain both integrated student bodies and officer corps.").

the nation's military academies and a diverse corps of military officers is a compelling governmental interest, and if nothing but affirmative action can achieve this interest (as the service academies have concluded), then surely the same is true of the legal academies and the legal profession. The need for an effective, diverse body of lawyers and judges is as essential to the pursuit of justice and to the defense of the Constitution and the rule of law as a diverse set of officers is necessary to the defense of our Nation's borders.

America still has not eliminated the obstacles to fair and equal treatment of all groups, and has not removed the obstacles to fair access that so differently affect different racial and ethnic groups. America has yet to fulfill her promise.

Despite the progress of the last forty years, *de jure* and *de facto* barriers to full participation by people of color in higher education, law school and the legal profession remain a stubborn fact of American life. The Court should therefore not impose legal standards that would, in practice, effectively end the policies of inclusion, and set back the progress of the last four decades, legal standards that would in fact turn us back to the time when virtually all law students, virtually all lawyers, virtually all law professors, and virtually all judges were of Caucasian descent. Such standards are not mandated by the Fourteenth Amendment.

III. THIS COURT ITSELF BENEFITS FROM THE VARIED PERSPECTIVES AND EXPERIENCES BROUGHT BY JUSTICES OF DIFFERENT RACES AND BACKGROUNDS, AND SHOULD NOT DENY LAW SCHOOLS AND THE LEGAL PROFESSION A SIMILAR BENEFIT

In her 1992 Tribute to Justice Thurgood Marshall, Justice O'Connor observed that "Justice Marshall brought a special perspective," imparting "not only his legal acumen but also

his life experiences, constantly pushing and prodding us to respond not only to the persuasiveness of legal argument but also to the power of moral truth." [16] Even individuals less extraordinary than Thurgood Marshall bring varied life experiences and perspectives which the legal profession requires from its attorneys as well as its judges. Diversity serves this compelling need.

This Court itself reflects diversity in race as well as gender and other varieties of experience derived in part from the different group and cultural identities and experiences of its members. That diversity serves the Court well.

Diversity has contributed to this Court in the same ways it contributes to the legal profession as a whole, including its law classrooms and the ranks of attorneys and judges: Diversity has added to the legal field persons with different cultural, gender, racial and group experiences, who bring valuable insights and perspectives that contribute to viewing legal problems in more fruitful ways. Breaking the "monoculture" within education enriches the experience of all students, and diversity ensures that the legal profession can perform its responsibilities effectively in a multiracial democracy.

Such a contribution to the adjudicative process of this Court appeared most dramatically—or perhaps it would be better to say, most openly to the public at large—in the recent arguments in *Virginia v. Black*, No. 01-1107, the cross-burning case. The *New York Times* described the transformative moments of the argument in *Black* as follows:

> The case, concerning a 50-year-old Virginia law, raised tricky questions of First Amendment doctrine, and it was

---

[16] Sandra Day O'Connor, "A Tribute to Justice Thurgood Marshall," 44 Stanford L. Rev. 1217 (1992).

not clear how the court was inclined to decide it—until Justice Clarence Thomas spoke.

A burning cross is indeed highly symbolic, Justice Thomas said, but only of . . . the "reign of terror" visited on black communities by the Ku Klux Klan for nearly 100 years before Virginia passed the law . . . .

A burning cross is "'unlike any symbol in our society," Justice Thomas said. . . "It was intended to cause fear and to terrorize a population."

During the brief minute or two that Justice Thomas spoke, about halfway through the hour long argument session, the other justices gave him rapt attention. Afterward, the court's mood appeared to have changed.

New York Times, Dec. 12, 2002 (p. 1).

We do not mean to suggest that the Court's ruling in *Virginia v. Black* must in the end follow the views so eloquently expressed by Justice Thomas. But however the Court rules, Justice Thomas's perspective clearly altered the consideration of the case, and brought insights that were necessary to properly weigh the issues at stake. The ultimate decision will be the richer for it.

In theory, perhaps, any other Justice could have raised the points that Justice Thomas did. But none did.

It is no coincidence that so intense an understanding of the significance of 100 years of lynchings and domestic racial terrorism came most forcefully (and perhaps exclusively) from the consciousness of the one African American member of the Court. This is only to recognize that the honorable members of this Court, like other judges, are not disembodied intellects, and their decisions and debates reflect—among

many other factors—the influence of their social contexts and settings, the wisdom borne of their different backgrounds.[17]

It would be particularly paradoxical for this Court to rule that giving reasonable, limited weight to race is intolerable in law school admissions when this Court itself has benefited from the participation of a Justice whose selection manifestly included consideration of his race—and rightly so.

No one can seriously dispute that, when the first President Bush selected Justice Clarence Thomas to fill the vacancy left by the retirement of Justice Thurgood Marshall, Justice Thomas's race was a factor—one among many—that President Bush considered. No one can seriously contend it was entirely a coincidence that the second African American ever to sit on the Supreme Court was selected to fill the vacancy created when the first African American Justice retired, nor that the President and the Senate which confirmed him did not consciously consider (among other factors) that it was fit and proper that this Court should continue to include at least one Justice from an African American background.

Such consideration of the race of a judicial nominee has been beneficial to the Court, not because Justice Thomas has the same world view or shares the same judicial orientation as had Justice Marshall. Rather, it is because each of them, in his own way, brought or brings to the Court's adjudication an

---

[17] As the California Supreme Court observed in the somewhat different, but not unrelated, context of jury selection: "Diversity serves to complement as well as neutralize viewpoints and attitudes. Diversity enhances the accuracy of a jury's decision making . . . . The members of a homogeneously composed jury are more likely to perceive evidence in a similar fashion. Also, they are more likely to filter out any evidence inconsistent with their shared attitudes and values. . . . [¶] In a culturally pluralistic society, particular behavior can have dramatically different meanings to members of different subcultures. A jury with diverse membership will recognize a fuller range of possible meanings . . . ." *Hovey v. Superior Court*, 28 Cal.3d 1, 23-24, 616 P.2d 1301 (1980).

awareness and perspective that is based in part on their experiences as African American individuals.

Race has been "taken into consideration" (as one factor among many) in the shaping of our Supreme Court, and rightly so. But then the question cannot be avoided: How can it be proper for race to be given weight—to be one legitimate factor, among others—in selecting the members of the highest court in the land, but not in the selection of a class of law school students? No, what is legitimate and constitutional for this Court is also legitimate and constitutional for the legal profession and for its gatekeeper, the law schools.

CONCLUSION

Law students, attorneys, judges, and citizens who come into the classrooms and courtrooms of our land seeking justice will all benefit when the faces and the minds they confront reflect the full diversity of America's rich and varied historical and cultural experience. The Constitution does not prohibit state-funded educational institutions from seeking to secure the educational value of a student body of diverse background and experience, as the Court held in *Bakke*. Nor do the abstract ideals embodied in the Fourteenth Amendment require this Court to ignore the practical impact of reversal of the Sixth Circuit's decision—re-segregation of our nation's elite public law schools and a dramatic reduction in the opportunity to pursue and obtain legal education for minority students. The Fourteenth Amendment is not a roadblock on the path to a vibrant, equal American society, a multiracial democracy in which all can participate.

Perhaps one or two decades from today, the legacies of racial bias and oppression may be so thoroughly extirpated that any further consideration of race in law school or university admissions will be unnecessary. That day has not yet come. The question for today is whether this Court will permit our

schools and the legal profession to move toward that day, or whether the Court will force us back in the opposite direction. *Amici*, who personally paid part of the price required to move this Nation away from segregation and discrimination, urge this Court to stay the course.

Respectfully submitted,

MITCHELL ZIMMERMAN *
MATTHEW HALL
ANTONIA SEQUEIRA
FENWICK & WEST LLP
801 California Street
Mountain View, CA 94041
(650) 988-8500

Counsel for Amici Curiae

* Counsel of Record

February 18, 2003